do so without infringing on the first amendment rights of programmers and adult viewers. See H.R. No. 934, 98th Cong., 2d Sess. 70 (1984), 1984 U.S.C.C.A.N. at 4655, 4707 (quoted supra at 5). And the federal courts have similarly acknowledged that these devices are effective for protecting children without burdening programmers' rights to speak. See cases cited supra Section I.C. Indeed, lockboxes are considered superior to central blocking because they place "responsibility for making such choices . . . where our society has traditionally placed it -- on the shoulders of the parent." Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 788 (3d Cir. 1990). See also Bolger, 463 U.S. at 73-74 (parental discretion controlling access to unsolicited contraceptive advertising is the preferred method of dealing with such material).

In the face of this precedent, the Commission has simply failed to explain in any manner either why lockboxes are now no longer effective or why a more burdensome means of protecting children has become necessary.[22/] Without record evidence that supports a well-reasoned determination that lockboxes are ineffective, the more restrictive option of central blocking cannot be implemented. Cf. ACLU v. FCC, 823

[22/] Nor has the Commission explored other alternatives that may be considered less restrictive than a ban or central blocking, such as a nighttime safe harbor. Cf. Action for Children's Television, 932 F.2d at 1509 (concerning Commission promulgation of nighttime safe harbor for broadcast).

F.2d 1554, 1579 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988).

III. THE COMMISSION'S PROPOSED REGULATIONS ARE CONSTITUTIONALLY DEFICIENT BECAUSE THEY ARE UNDERINCLUSIVE

Because the constitution will tolerate a content-based restriction on speech only when it "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end," Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983), the failure of such a restriction to address the entirety of a problem "undermine[s] [the] claim that the prohibition . . . can be justified by reference to the State's interest." Carey v. Brown, 447 U.S. 455, 465 (1980). Underinclusiveness thus stands as an important standard against which to judge content-based restrictions on speech. See FCC v. League of Women Voters, 468 U.S. 364, 396-98 (1984) (underinclusiveness as basis for striking down ban on editorializing on only noncommercial stations receiving public funds); Community-Service Broadcasting v. FCC, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc) (underinclusiveness as basis for striking down requirement that only noncommercial educational broadcast stations retain audio recordings of broadcasts).

Taken as a whole, the Commission's Proposed Rule is unconstitutionally underinclusive and thus cannot be considered to further a compelling goal. This underinclusiveness results from the Commission's decision to parrot Section 10 in its Proposed Rule. Although one Senate sponsor

purported to be concerned with "forbid[ding] cable companies from inflicting their unsuspecting subscribers with sexually explicit programs," 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms), Section 10 is targeted only at PEG and leased access channels. Congress therefore granted the Commission the power to regulate through prohibitions and blocking only a small part of what it regarded as a larger problem. Because the larger problem is not addressed, however, the goal of the statute can hardly be considered compelling.

In largely reiterating Section 10, the Commission's Proposed Rule mirrors this constitutional defect and further demonstrates the lack of any compelling state interest. The only governmental interest that the Commission has mentioned with respect to its Proposed Rule is that "children's exposure to indecent programs is effectively eliminated." Notice ¶ 9, at 5. In line with its limited authority under Section 10, however, the Commission can only target access channels. It has no statutory authority to apply these strictures across the board, and, even if it did, to do so now without further notice and comment would violate the Administrative Procedures Act. See generally infra Section VI. Finally, an across the board restraint would self-evidently greatly magnify all of the other constitutional concerns outlined in these Comments.

Moreover, the Commission has failed to narrowly interpret the statute in a way that would provide for even-handed application -- i.e., to prevent operators from prohibiting

from access channels the same types of programming it carries on other of its channels. Because the Proposed Rule omits such a safegard, the Commission would allow a cable operator to cablecast sexually explicit programs over non-access channels while it prohibited the same type of programming on access channels.[23/]

The underinclusiveness common to both the statute and the Proposed Rule is especially suspect because the legislative history of the Act demonstrates that Congress was aware that cable operators carry sexually explicit programming on channels other than leased access.[24/] For example, floor statements evidence a concern that the Playboy Channel had been carried over a leased access channel in Puerto Rico. 138 Cong. Rec. S646, S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). While the Commission's proposed regulations might require that the Playboy Channel be scrambled on leased access, it places no similar restriction on its carriage over

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[23/] In dicta, the Supreme Court in R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2545 (1992), stated that no fatal underinclusiveness is presented by "a State's prohibiting obscenity (and other forms of prescribable expression) only in certain media." Because the Commission's Proposed Rule differentiates between cablecasts over the same media, however, the Court's dicta in this regard is inapposite. Moreover, the Proposed Rule goes well beyond proscribable expression and intrudes upon constitutionally-protected speech.

[24/] Nor has the Commission in this docket developed any facts on the record tending to show that access programming is somehow a greater problem.

the other cable channels on which it far more typically appears.

Section 15 of the Act, which concerns unsolicited sexually explicit "premium channel" programs, also demonstrates that Congress was aware of sexually explicit non-access programming but did not find that prior blocking was necessary. Rather, Congress found that the problem was sufficiently resolved by allowing subscribers to request central blocking of the unsolicited premium channel -- just as they can use lockboxes to block pre-existing channels (including access channels) if sexually explicit programming on these channels was unwelcome. See generally supra Section II (discussing lockboxes).

The narrow scope of Section 10 and the Commission's Proposed Rule is especially invidious in this context. The users of PEG and leased access channels have traditionally been those less powerful interests who otherwise have no access to the electronic media -- a situation that is only reinforced by Section 9 of the Act, which specifically encourages the use of leased access by "programming source[s] which devote[] substantially all of [their] programming to coverage of minority viewpoints, or to programming directed at members of minority groups." Section 9(c) (codified at 47 U.S.C. § 532(i)). The Supreme Court's caution in Cornelius, v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985), is therefore particularly apt. When the "purported concern [is] to avoid controversy excited by particular

groups," warned the Court, distinctions "may conceal a bias against the viewpoint advanced by the excluded speakers." Id. at 812. Cf. R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2547 (1992) (banning some types of words but not others presents a "realistic possibility that official suppression of ideas is afoot").[25/]

In sum, Section 10 and the Commission's Proposed Rule do not pursue a compelling state interest, and the Commission cannot overcome the statute's underinclusiveness by simply applying the scheme set out in Section 10 to all cable channels. Neither the 1992 Act nor the 1984 Act affords the Commission any such sweeping authority, which would be unconstitutional in any event. However, the use of regulations concerning lockboxes -- which are authorized by statute -- to implement the constraints of Section 10 would permit the Commission to address Congress's concern for protecting unprotected children from cable programming their parents find inappropriate, and to do so on an evenhanded basis that applies to all cablecasts.

[25/] R.A.V., too, is especially apt with respect to the Commission's standards for censoring PEG. In an apparent attempt to cover all programming that might in any way be considered inappropriate for children, that standard allows the censoring of both indecency and "material soliciting or promoting unlawful conduct." Because the Proposed Rule does not, however, proscribe all but the enumerated forms of allegedly inappropriate speech, it must be considered as an unconstitutional attempt to "regulate use based on hostility -- or favoritism -- towards the underlying message expressed." 112 S. Ct. at 2545.

IV. THE STANDARDS FOR PROHIBITING SPEECH THAT ARE PROPOSED BY THE COMMISSION ARE OVERBROAD AND HENCE UNCONSTITUTIONAL

The Commission's Proposed Rule is overbroad in two different respects. First, the standard for prohibiting PEG programming intrudes upon protected speech. Second, the Commission has not given a narrowing construction to the liability standard contained in Section 10(d).

First, while the federal courts have occasionally suffered the regulation of speech when it is the only way to protect children, they have more generally recognized that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-13 (1975) (citations omitted). Far from being "narrow and well-defined," however, subsection (c) of the Commission's Proposed Rule covers "material soliciting or promoting unlawful conduct," a broad and vague expanse that renders the standard regarding PEG restrictions unconstitutionally overbroad. See e.g., Village of Shaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633-39 (1980); Bigelow v. Virginia, 421 U.S. 809, 815-18 (1975).

Generally, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of . . . law violation," the only exception being inapplicable to the present situation -- "where such advocacy is directed to inciting or producing imminent lawless action

and is likely to incite or produce such action." Hess v. Indiana, 414 U.S. 105, 108 (1973) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). See also Noto v. United States, 367 U.S. 290, 297-98 (1961) ("the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence[] is not the same as preparing a group for violent action and steeling it to such action"). To preserve our political system's ability to change in the face of evolving notions of justice, the government cannot prevent the citizenry from advocating civil disobedience against unjust laws -- e.g., advocating for the underground railroad to fight slavery or advocating the refusal to sit at the back of the bus to fight segregation.

Similar problems are posed by the PEG restriction on "sexually explicit conduct." This standard omits provisions requiring either that the depiction be "patently offensive" or that it fail under a community standard. It thereby restricts far more speech that has ever been heretofore countenanced, even in protecting minors.[26/]

The Commission recognizes the overbreadth of these provisions when it suggests in its Notice that these terms would have to be narrowed. ¶ 13, at 6 n.11. Subsection (c) of the Commission's Proposed Rule contains no such limiting construction, however, and it therefore remains overbroad. At the

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[26/] Even were the Commission to limit "sexually explicit conduct" to indecency, we note that the indecency standard, too, raises serious first amendment concerns. See Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

least, any final rate that the Commission may promulgate in this docket should explicitly narrow the PEG standard to obscenity, indecency as elsewhere defined, and soliciting prostitution.[27/]

Second, the Commission has also failed to offer a limiting construction of Section 10(d), which extends liability to cable operators who carry programming that "involves obscene material." While it might be the case that liability could be imposed in the proper circumstances -- which would have to include procedural protections that are now absent (see infra Section V) -- for carrying obscenity itself, in no case could it extend to carrying material that "involves" obscenity. Because the "involves" standard is an indefinite and nebulous term that fails to put cable operators on notice as to what programming may subject them to liability, Section 10(d) is unconstitutionally vague and overbroad. Cf. Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 781 (C.D. Cal. 1991) (finding unconstitutionally vague a standard concerning material which in the judgment of the NEA may be considered obscene).

[27/] An avowal by the Commission that they would adhere to any limiting construction not contained in the final rule itself is insufficient in this regard for two reasons. First, because section (d) of subsection 10 is a waiver of a liability immunity, others besides the Commission will be making liability determinations. Second, even if the determination were to be made by the Commission, its avowal does not have the binding force of a rule. Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 782 (C.D. Cal. 1991).

To survive first amendment scrutiny, a statute must be drafted with precision. See Hobbs v. Thompson, 448 F.2d 456, 460 (5th Cir. 1971) ("The overbreadth doctrine, therefore, focuses directly on the need for precision in legislative draftsmanship to avoid conflict with First Amendment rights."); cf. Video Software Dealers Ass'n v. Webster, 773 F. Supp. 1275, 1280 (W.D. Mo. 1991) (statute regulating protected speech must have purpose articulated with great precision; where purpose of statute not clearly articulated, statute stricken as overbroad), aff'd, 968 F.2d 684 (8th Cir. 1992). Thus, words such as "involving" and "tending," which foster indefiniteness, lead to imprecision and constitutional infirmity. For that reason, the Supreme Court in Gooding v. Wilson, 405 U.S. 518 (1972), found unconstitutional for vagueness and overbreadth a statute that outlawed speech "tending to a breach of the peace" because this standard was "'infinitely more doubtful and uncertain'" than "breach of the peace." Id. at 427 (citations omitted). See also Gregory v. City of Chicago, 394 U.S. 111, 119 (1969) (Black, J., concurring). Section 10(d)'s liability standard suffers from the same infirmity and, without a narrowing construct, cannot be considered constitutional. Cf. Grayned v. City of Rockford, 408 U.S. 104, 111 (1972) ("tends to disturb" imprecise when not construed narrowly).

V. THE COMMISSION HAS PROPOSED PROCEDURES FOR PROHIBITING SPEECH THAT ARE CONSTITUTIONALLY DEFICIENT

The Proposed Rule envisions denying programmers the ability to use PEG and leased access based on the sexually explicit or politically controversial nature of their message, thereby constituting a system of content-based prior restraints. See Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989) (denial of the use of a forum prior to actual expression constitutes a prior restraint); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (same). "While '[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes . . . bearing a heavy presumption against its constitutional validity.'" FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990) (quoting Southeastern Promotions, 420 U.S. at 558). See also Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 70 (1963).[28/]

The federal courts have long held that to survive this strict constitutional scrutiny, prior restraints must, at a minimum, "take[] place under procedural safeguards designed to

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28/ As prior restraints, the proposed regulations stand in marked contrast to various "dial-a-porn" regulations that have been promulgated by the FCC and upheld by the Courts. Those regulations have no prior restraints because, rather than preventing the transmission of the sender's messages, they only hinder their receipt by minors. See Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1543 (2d Cir. 1991), cert. denied, 112 S. Ct. 966 (1992); Information Providers' Coalition v. FCC, 928 F.2d 866, 877-78 (9th Cir. 1991). It should be noted in this context that lockboxes, too, do not constitute prior restraints.

obviate the dangers of a censorship system." Freedman v. Maryland, 380 U.S. 51, 58 (1965). The Proposed Rule that the Commission has issued in this docket omits any such procedural protection. For that reason alone, it is unconstitutional.

With respect to only PEG, the Commission's Notice does ask for comments regarding procedures "to govern disputes between the cable operator and programmer," proposing that "any such disputes should be handled at the local level." ¶ 14, at 7. As an initial matter, even were this request to lead to some sort of dispute resolution mechanism, it would not extend to leased access programmers. Moreover, even if it did provide full coverage, no system of the type envisioned could provide sufficient protection for the constitutional rights that are at stake. An informal dispute resolution mechanism will not satisfy the first amendment's requirement for procedural safeguards.[29/] Rather, such safeguards must include at least three elements:

> "First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." Southeastern Promotions, 420 U.S. at 560.

[29/] Nor does the Commission propose procedures that will protect programmers from arbitrary decisions by operators, whose incentives are contrary to access channels. See supra pages 2-4 and 9-10. The Proposed Rule failed to include safeguards against delay, for example, or against invidious discrimination.

Because these elements are absent from informal dispute resolution, the notice does not request comment on a constitutionally sufficient system of procedural protections. Rather, the only constitutionally permissible system of dispute resolution would require operators to go to court for an adjudication that a specific program is obscene before that program may be kept off the cable system.

The Commission's Proposed Rule is also procedurally defective with regard to the standard by which a cable operator may be held liable for carrying "material involving obscenity." Liability for obscenity requires that the actor know the content of the material found obscene, Smith v. California, 361 U.S. 147, 152-54 (1959); Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 690 (8th Cir. 1992) ("any statute that chills the exercise of First Amendment rights must contain a knowledge element"), but neither the statute nor the proposed Rule contains any such knowledge requirement.

Given the present circumstances, the Commission should grant operators immunity from liability unless knowledge of obscenity is established through an operator's awareness that the implicated program had been determined to be obscene in a prior judicial determination in the same community. Cf. Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 783 (C.D. Cal. 1991) (chilling effect of vague statute requires judicially administered procedural protections). This would more fully implement the policies behind the knowledge ele-

ment, which is required in order to circumscribe the chilling effect that will flow from imposing liability from speech. Ordinarily, the knowledge requirement works in tandem with the requirement that the provision specify the prescribable speech with particularity. Here, because Section 10(d) reaches programming that "involves obscene material," that particularity is missing. By requiring that knowledge be established only by a prior judicial determination has declared a program obscene, the Commission will move towards restoring the proper first amendment balance.[30/]

VI. THE COMMISSION'S INSUFFICIENT NOTICE OF ITS PROPOSED REGULATIONS PREJUDICES INTERESTED PARTIES' RIGHT TO COMMENT

We have already demonstrated that, in a number of different ways, the Commission has failed to act according to the precepts of administrative law. First, it has failed to articulate the purposes that will be served by its Proposed Rule. See supra page 43. Second, it has failed to present record evidence concerning the existence of whatever problem its Proposed Rule is intended to solve. See supra page 44. Third, it has failed to present its reasoning as to the way

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30/ The Commission recognizes this knowledge requirement when it proposes to waive Section 10(d) for operators who have not been informed by programmers that their programming is obscene. As a matter of logical consistency, the Commission should also state in its final rule that an operator is not enabled to prohibit a program pursuant to Sections 10(b) and 10(c) when it has not been informed by a prior judicial determination that the program is obscene.

that the Proposed rule would serve as a means of solving that problem. See supra pages 45-46.

An additional administrative law problem pervades this docket. Section 553(b)(3) of the Administrative Procedures Act (the "APA") requires an agency initiating a rulemaking to issue a notice that includes a complete description of either the terms of the proposed rule or the subjects and issues involved. 5 U.S.C. § 553(b)(3). The Commission has failed in this regard in several different respects.

With respect to PEG generally, the Notice is literally without standards. Paragraph 14 asks commenters to address "whether our regulations should provide for any additional matters not expressly addressed in the statute," and it "invite[s] interested persons to comment on these and any other aspects that they believe would be germane to proper implementation of this provision." This general request for comments fails to "describe the range of alternatives being considered with reasonable specificity." See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983) ("interested parties [do] not know what to comment on").

The Notice also fails to speak concretely about several specific PEG proposals. For example, Paragraph 14 also invites comment on whether the Commission should require "certifications by users or operators that no materials fitting into any of these statutory categories will be presented" on PEG. The Proposed Rule itself, however, makes no

mention of such certification, despite the fact that it is clearly being contemplated by the Commission. It therefore runs afoul of the requirement of a detailed proposed rule, which "allows the parties to direct their comments toward concrete proposals, not amorphous subject areas. Such an approach is designed to generate a focused inquiry by both the agency and the parties." National Tour Brokers Ass'n v. United States, 591 F.2d 896, 901 (D.C. Cir. 1978).

Similarly, the Proposed Rule omits any formulation for the Commission's contemplated implementation of "specific procedures . . . to govern disputes between the cable operator and programmer of these [PEG] access channels." Notice ¶ 14. This again prejudices the right of parties to direct their comments towards concrete proposals.

All of these errors are replicated in the notice with respect to leased access. For example, Paragraph 12 contains the same problematic general invitation asking commenters "to bring to our attention any other matters not discussed in this notice" and "seek[ing] comment on any other requirements that should be adopted in order to effectuate the new law's provisions." In Paragraph 11, the Commission seeks comment on whether cable operators "can require program providers to certify that their programming is not obscene or indecent," despite the fact that the Proposed Rule mentions nothing about the form, content or any other aspect of the proposed certification. Indeed, despite this absence, the Commission "assume[s]" that such certification is appropriate.

Similarly, Paragraph 9 requests comment on "blocking mechanisms and procedures relating to subscriber access," but none are contained in the Proposed Rule. And Paragraph 12 asks commenters to address two issues not the subject of the Proposed Rule itself: "whether a cable operator should be required to retain notifications for a prescribed period of time," and (ironically, given the absence of this proposal from the Proposed Rule), "whether a cable operator should be held harmless from liability under our proposed rules if it does not receive any, or timely, notification from a programmer" [emphasis added].

These deficiencies present three related administrative law problems. First, Section 553(b) requires an agency giving notice to "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." Home Box Office, Inc. v. FCC, 567 F.2d. 9, 36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). See also Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988) (notice "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully"), cert. denied, 490 U.S. 1045 (1989); Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 530 (D.C. Cir.) ("If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."), cert. denied, 459 U.S. 835 (1982). The Commission's

numerous omissions fall far short of this standard, however. The final rule will necessarily "deviate[] too sharply from the proposal, [and] affected parties will be deprived of notice and an opportunity to respond to the proposal." Small Refiner, 705 F.2d at 547.

Second, by avoiding the promulgation of concrete proposals, the Commission has also avoided going into detail as to its reasoning behind offering the suggested items. As the federal courts have instructed, "the notice required by the APA must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based." Home Box Office, 567 F.2d at 35 (emphasis added). Without this discipline, the quality of the final rulemaking suffer for want of the proposal being "tested by exposure to diverse public comment." Small Refiner, 705 F.2d at 547. See also National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 641 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980).

Third, without the agency's full reasoning and the exchange of views it engages from the public, a notice as insufficient as the Commission's compromises judicial review as well as. See Home Box Office, 567 F.2d at 35. Without precision concerning the contemplated agency action, commenters are deprived of their ability "to develop evidence in

the record to support their objections," which further compromises judicial review. Small Refiner, 705 F.2d at 547.[31/]

We therefore urge that the Commission, in response to the instant comments and those submitted by other parties, issue a second proposed rulemaking and accept a second round of comments to allow for the full participation required by the APA. We note in this regard that Section 10's statutory deadlines for the promulgation of rules presents no hurdle to the Commission. The federal courts have recognized that a statutory deadline must yield to the requirements of the APA when, as here, "Congress gave no explicit indication that it intended to override the procedural safeguards of the APA." Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (3d Cir. 1979).

[31/] See also McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (an agency's consideration of comments, "no matter how careful," cannot cure the defect of inadequate notice); AFL-CIO v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985) (proper notice cannot be attributed to parties on the assumption that they monitor the comments of others); New Jersey v. EPA, 626 F.2d 1038, 1049 (D.C. Cir. 1983) (permitting an agency to consider comments requested after publication of a final rule to substitute for proper notice would render the APA "virtually unenforceable"); Small Refiner, 705 F.2d at 549 (having failed to provide proper notice, an agency cannot "bootstrap" notice from a comment). Moreover, because proper notice is a prerequisite to proper rulemaking, a party's separate right to subsequently petition for amendment of a final rule does not obviate an agency's duty to provide proper notice of a proposed rule in the first place.

> "5 U.S.C. § 553(b) requires notice before rulemaking, not after. The right of interested persons to petition for the issuance, amendment, or repeal of a rule, is neither a substitute for nor an alternative to compliance with the mandatory notice requirements of § 553(b)." National Tour Brokers, supra, 591 F.2d at 902.

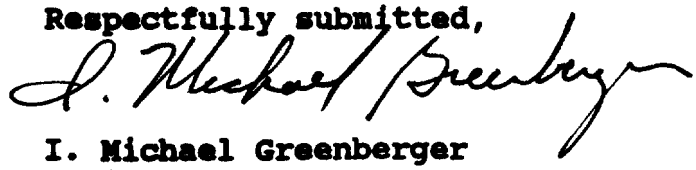
See also New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980); United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979).

CONCLUSION

Where a government has intentionally opened a forum for discourse, it cannot simply authorize restrictions on speech in that forum either directly or through a private party acting with its authority. Rather, any restriction on speech must be carefully tailored to balance the interests of government against those who wish to speak. If those restrictions are not narrowly drawn, the restrictions are unconstitutional.

The Commission has failed to undertake the appropriate balancing in the instant docket. Instead, it has simply reiterated the provisions of Section 10. The result is a Proposed Rule infected by serious constitutional defects: a lack of articulated purpose, failure to examine the nexus between any such purpose and the chosen means, no attention to alternatives, and a failure to include safeguards. With its rulemaking in this posture, before the Commission issues a final rule, it should again accept public comments once it has presented on the record its reasoning with respect to these basic issues.

Respectfully submitted,



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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992	MM Docket No. 92-258
Indecent Programming and Other Types of Materials on Cable Access Channels	

APPENDIX TO
JOINT COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION AND PEOPLE FOR THE AMERICAN WAY

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Dated: December 7, 1992

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Exhibit C - Douglas Davis, Public-Access TV is Heard in the Land, N.Y. Times, June 11, 1989, at H-31, H-36

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Exhibit I - Access Sacramento, 1991 Audience Survey Findings Report (1991)

Exhibit J - William Morris, Northwest Community Television Subscriber Study (May 1992)

Exhibit K - Diana Agosta et al., The Participate Report: A Case Study of Public Access Cable Television in New York State 45 (1990)

Exhibit L - Patricia Aufderheide, Public Access Cable Programming, Controversial Speech, and Free Expression (Draft, Nov. 1992) (including affidavit)

Exhibit M - Excerpts from affidavit of Joseph J. Collins (Nov. 4, 1992)

Exhibit N - Letter from InterMedia Partners to Tucson Community Cable Corp. (Nov. 13, 1992)

Exhibit O - Customer Handbook, Jerrold IMPULSE 7000 (General Instrument, Apr. 1990)

Exhibit P - Customer Handbook, Jerrold STARCOM VI (General Instrument)

Exhibit Q - **Customer Handbook, Jerrold STARCOM 7 (General Instrument, May 1988)**

Exhibit R - **1991 Annual Report Tucson Community Cable Corp. (1992)**

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